APPEAL NO. 061195
FILED JULY 28, 2006

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on May 16, 2006. The hearing officer resolved the disputed issues by deciding that the employer made a bona fide offer of employment (BFOE) to the appellant (claimant) and that the claimant sustained disability from October 27 through October 31, 2005, but not thereafter through the date of the CCH. The claimant appealed, disputing both the determination of a BFOE and the determination of disability. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified and the medical records reflect that the claimant fractured her right ankle on _____, when she tripped and fell while walking out of a walk-in cooler. The employer took the claimant to (clinic) for medical treatment. The initial medical records (dated _____) note that the claimant was not to work for the rest of the shift and then only "sedentary duty with crutch training." The _____, record additionally reflects that the claimant was referred to an orthopedic specialist. A Work Status Report (DWC-73) dated _____, released the claimant to return to work with restrictions (sedentary work only, must wear crutches), and noted the claimant was to follow up with another doctor on October 27, 2005. On October 27, 2005, another doctor from the same clinic examined the claimant and noted he wanted her to continue with her "short walker boot and crutches." The doctor who examined the claimant on October 27, 2005, released her to return to work with the following restrictions: no kneeling or squatting with the right foot/ankle, must use crutches 100% of the time and should be sitting 95% of the time.

In evidence was a written offer of employment to the claimant from the employer dated October 28, 2005. The claimant acknowledged she received the written offer on October 31, 2005. The offer noted that it would "remain open for seven days from your receipt of this letter." The claimant testified that she called her employer upon receipt of the offer and voiced several concerns about coming back to work including transportation issues and her continuous pain. The claimant testified that she told the employer she wanted to see a doctor again. The person the claimant spoke with from the employer testified at the CCH and stated the when speaking to the claimant regarding the offer of employment, the claimant stated she wanted to see the doctor again. The employer offered transportation to the claimant and called her back on October 31, 2005, and left a message that the claimant needed to be at work on November 1, 2005, a second message was subsequently left for the claimant that if she did not return to work on November 1, 2005, it would be considered insubordination.

The claimant testified that she went to see her own doctor, Dr. K on November 1, 2005. Although a DWC-73 from Dr. K is not in evidence, there is correspondence from Dr. K dated November 3, 2005, which indicates that she took the claimant off work completely on November 1, 2005, pending her evaluation with an orthopedic doctor. A letter of termination dated November 1, 2005, was in evidence citing the claimant's refusal to accept the employer's light duty offer of employment as reason for the termination. The medical records reflect that the claimant followed up with an orthopedic doctor referred by Dr. K and that the claimant's right foot was placed in a cast. The orthopedic doctor continued to treat and followed up with the claimant until January 25, 2006. A medical record from the orthopedic doctor dated January 25, 2006, reflects that the claimant's fracture was healed and the claimant was released to all activities.

BFOE

28 TEX. ADMIN. CODE § 129.6 (Rule 129.6) sets out the requirements for a BFOE. Rule 126.9(c) provides that the first doctor who provides health care to an injured employee shall be known as the injured employee's initial choice of treating doctor. Further, Rule 126.9(c) provides that a doctor recommended by the carrier or employer does not constitute an initial choice of treating doctor unless the injured employee continues, without good cause as determined by the Texas Department of Insurance, Division of Workers' Compensation [Division], to receive treatment from the doctor for a period of more than 60 days. Rule 129.6(b) provides that an employer may offer an employee a modified duty position, which has restricted duties which, are within the employee's work abilities as determined by the employee's treating doctor. In the absence of a DWC-73 by the treating doctor, an offer of employment may be made based on another doctor's assessment of the employee's work status provided that the doctor made the assessment based on an actual physical examination of the employee performed by that doctor and provided that the treating doctor has not indicated disagreement with the restrictions identified by the other doctor. *See* Appeals Panel Decision (APD) 051731, decided September 12, 2005; APD 041337, decided July 20, 2004; and APD 040468, decided April 22, 2004.

Although there was no DWC-73 from Dr. K in evidence, there is evidence that Dr. K disagreed with the restrictions made by the doctor who examined the claimant at the employer's recommendation. It is clear that the offer of employment from the employer was based on the restrictions of the doctor who examined the claimant at the employer's recommendation. Further, the evidence reflected that the claimant was terminated by the employer prior to the expiration of the seven days that the light duty offer was extended to the claimant for acceptance. The carrier contends that the claimant's excuses and request to see a doctor amounted to a refusal of the light duty offer and the claimant contended that she never refused to accept the offer of light duty but rather was terminated.

Because Dr. K disagreed with the restrictions identified by the "other doctor" and because the claimant was terminated prior to her acceptance or rejection of the offer of employment, the hearing officer's determination that the employer made a BFOE to the

claimant is reversed and a new determination rendered that the employer did not make a BFOE to the claimant.

DISABILITY

Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." The Appeals Panel has stated on numerous occasions that the issues of BFOE and disability are distinct. Appeals Panel Decision (APD) 001143, decided July 3, 2000. Disability concerns whether a claimant is unable to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury, while a BFOE is used to determine the amount of temporary income benefits (TIBs) due, if any. Id. To be clear, the existence of a BFOE does not result in the end of disability but only a determination of post-injury earnings for purposes of entitlement to TIBs. Id. The Appeals Panel has said on numerous occasions that a claimant under a light-duty release does not have an obligation to look for work or show that work was not available within his or her restrictions. APD 022908, decided January 8, 2003. It is evident that in this case the hearing officer ended disability based on her finding of a BFOE. The BFOE determination was reversed for reasons stated herein. The hearing officer's determination that the claimant had disability from October 27 through October 31, 2005, but not thereafter through the date of the CCH is reversed and a new determination rendered that the claimant had disability from October 27, 2005, through January 25, 2006.

The hearing officer's determination that the employer made a BFOE to the claimant is reversed and a new determination rendered that the employer did not make a BFOE to the claimant. The hearing officer's determination that the claimant had disability from October 27 through October 31, 2005, but not thereafter through the date of the CCH is reversed and a new determination rendered that the claimant had disability from October 27, 2005, through January 25, 2006.

The true corporate name of the insurance carrier is **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Veronica L. Ruberto
Appeals Judge